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No. 85-372

In The

Supreme Court of the United States

October Term, 1985

ELAINE CHRISTENSEN, *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD E. OLSON, JR.
NEVADA INDIAN-RURAL LEGAL SERVICES
600 East William Street, Suite 301
Carson City, Nevada 89701
Telephone: (702) 885-5110

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTION PRESENTED

Did the codification in the 1948 Judicial Code of the six-year statute of limitations for certain actions against the United States formerly found in a subsection of the 1940 Judicial Code extend that statute of limitations to actions relating to Indian allotments, which were not subject to any statute of limitations prior to the adoption of the Judicial Code of 1948?

PARTIES

The parties before the Court of Appeals in the proceeding below are: Elaine Christensen, Orville Brown, the estate of Doran Pete, and the estate of Gladys Walker, each of whom holds an undivided interest in the Indian allotment which is the subject matter of this litigation[1] and who are referred to herein as the allotment interest-holders, the Petitioners herein; and the United States of America and the Secretary of the Interior in his official capacity, the Respondents herein.

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[1] Doran Pete and Gladys Walker, plaintiffs in the proceedings before the District Court for the District of Nevada, have died during the pendency of this litigation. Determination of the successors to the interests of Doran Pete and Gladys Walker in the Martinez Indian allotment, the subject matter of this litigation, will be made in probate proceedings conducted by the Secretary of the Interior pursuant to 25 U.S.C. §§ 372 and 373 and 43 C.F.R. § 4.200 *et seq.* However, these provisions do not contemplate the appointment of a personal representative or executor in such proceedings; therefore, substitution of such a personal representative or successor at this time is impossible, and this proceeding is brought in the names of the original parties. Leave to substitute the respective successors in interest to the deceased parties will be sought pursuant to Rule 40.1, after those successors are determined by the Secretary of the Interior.

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ELAINE CHRISTENSEN, *et al.*,

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UNITED STATES OF AMERICA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners Christensen, Brown, Pete, and Walker, the allotment interest-holders, respectfully pray that this Court issue a Writ of Certiorari to review the judgment and the opinion of the United States Court of Appeals for the Ninth Circuit in *Elaine Christensen, et al. v. United*

States of America, et al., No. 84-1971 (March 12, 1985), (rehearing denied June 7, 1985).

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 755 F.2d 705 (9th Cir. 1985), and is printed as Appendix A to this petition. The opinion of the District Court is reported at 583 F. Supp. 1539 (D. Nev. 1984), and is printed as Appendix B. An earlier opinion of the District Court on a question not at issue in this proceeding is reported at 575 F. Supp. 735 (D. Nev. 1983). The order of the Ninth Circuit Court of Appeals denying the Petitioners' Petition for Rehearing is not reported, and is printed as Appendix C.

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JURISDICTION

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1). The opinion of the Court of Appeals sought to be reviewed was issued on March 12, 1985. The allotment interest-holders filed a timely petition for rehearing. The Order of the Court of Appeals denying the petition for rehearing was issued June 7, 1985.

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STATUTES INVOLVED

This case involves the interrelation of two Acts of Congress. The first of these, 28 U.S.C. § 2401(a), provides in pertinent part that

> every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.

The second, 25 U.S.C. §§ 345-346, provides in pertinent part that the

> district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty. . . .

The full text of §§ 345-346, and the text of two relevant prior but now repealed statutes, 28 U.S.C. §§ 41(20) and (24) (1940 Ed.), is printed as Appendix D.

STATEMENT OF THE CASE

Petitioners hold undivided interests in an Indian allotment located in Douglas County, Nevada for which Katie Martinez, a Washoe Indian, filed an application in 1915, and which the United States conveyed in trust to Ms. Martinez in 1933. The allotment has continued to be and now is held in trust by the United States for the use and benefit of the allotment interest-holders. At the time the Martinez allotment was issued, and continuing until the

present, the allotment has been landlocked: The only feasible access to the allotment from a public road has been across privately owned land which was patented by the United States to a private individual in 1867, and which has continued in private ownership to the present. Access to the Martinez allotment was permitted across this privately owned land with the permission of the owners until the death of Katie Martinez in 1948 and the death of her spouse in 1951. Since 1951, access to the allotment has not been permitted across this privately owned land, and the allotment interest-holders have been able to obtain access to the Martinez allotment only on rare occasions.

Despite repeated requests by the allotment interest-holders since 1951, the Bureau of Indian Affairs, Department of the Interior, has not provided access to the Martinez allotment. In March, 1983, the allotment interest-holders filed an action in the District Court for the District of Nevada under 25 U.S.C. §§ 345-346, asserting that pursuant to the trust responsibility imposed upon the United States by 25 U.S.C. § 348, the United States had the obligation to provide the interest-holders access to the allotment, and was liable in money damages for past failures to provide such access. The allotment interest-holders sought to compel the United States to fulfill its obligation to assure them the use and benefit of the allotment, by purchasing or by condemning under state law a right-of-way affording access to the allotment. This would have involved either obtaining an easement to use an existing dirt road to the allotment, or the condemnation of an easement across approximately fifty to one hundred feet of privately owned land and the construction of a short dirt road across federally owned land.

The United States first filed a motion for judgment on the pleadings asserting that, as a matter of law, the United States had no obligation to provide access to the allotment. The District Court denied this motion, finding that while the United States was not liable in money damages for past deprivation of access to the Martinez allotment, prospective relief ordering the United States to provide access "is not beyond the reach of the Plaintiffs' complaint, as a matter of law." *Christensen v. United States,* 575 F. Supp. 735, 738 (D. Nev. 1983).

The United States also filed a motion for summary judgment, asserting that the allotment interest-holders had failed to state a claim upon which relief could be granted, and that their claims were barred by the six year statute of limitations for actions against the United States, 28 U.S.C. § 2401(a). The District Court granted summary judgment in favor of the United States, concluding that 28 U.S.C. § 2401(a) barred the allotment interest-holders' claims. The Court of Appeals affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

In concluding that the statute of limitations of 28 U.S.C. § 2401(a) applied to a claim relating to an Indian allotment brought pursuant to 25 U.S.C. §§ 345-346, the Court of Appeals erroneously interpreted the derivation and legislative history of 28 U.S.C. § 2401(a), and reached a conclusion which is in conflict with decisions of the Eighth and Tenth Circuit Courts of Appeals. This case affords this Court the opportunity to restore conformity

to the decisions of the circuit courts of appeals, and to definitively resolve this important issue of whether any statute of limitations operates to terminate the United States' responsibility to the holders of interests in Indian allotments.

I. The Decision Below Directly Conflicts With Decisions Of The Eighth Circuit Court Of Appeals.

The Eighth Circuit Court of Appeals has held that actions relating to rights in Indian allotments brought pursuant to §§ 345-346 are not subject to the limitation period established by § 2401(a). In *Mottaz v. United States,* 753 F.2d 71 (8th Cir. 1985), the Eighth Circuit Court concluded that § 2401(a) does not bar §§ 345-346 actions for the federal government's wrongful taking of an Indian allotment. *Id.* at 74-75. In so holding, the court reiterated its position in *Antoine v. United States,* 710 F.2d 477 (8th Cir. 1983), in which an action against the United States for the loss of an Indian allotment was sustained, although the cause of action had accrued almost 100 years before the proceeding was commenced by the great-grandson and heir of the original allottee. *Id.* at 478.

The Tenth Circuit Court of Appeals also appears to consider that the limitation of § 2401(a) does not bar actions properly brought pursuant to §§ 345-346. *Vincenti v. United States,* 470 F.2d 845, 847 (10th Cir. 1972), *cert. dismissed,* 414 U.S. 1057 (1973); *See also, Begay v. Albers,* 721 F.2d 1274, 1277-79 (10th Cir. 1983).

In the view of both the Eighth and Tenth Circuit Courts of Appeals, § 2401(a) does not apply to actions re-

lating to Indian allotments brought pursuant to 25 U.S.C. §§ 345-346, such as that initiated by the allotment interest-holders in this case. The position of the Ninth Circuit Court in this case is directly contrary.[1] It is therefore appropriate for this Court to resolve this clear conflict among the circuit courts of appeals.

II. The Court Below Disregarded The Derivation And Legislative History Of 28 U.S.C. § 2401(a) Which Demonstrate That This Statute Is Not Applicable To Actions Brought Pursuant To 25 U.S.C. §§ 345-346.

The derivation and legislative history of 28 U.S.C. § 2401(a) make it clear that § 2401(a) has no application to actions relating to Indian allotments brought pursuant to 25 U.S.C. §§ 345-346. Section 2401(a) was derived from § 41(20) of Title 28 of the 1940 United States Code, *see*, H.R. Rep. No. 308, 80th Cong., 1st Sess., Appendix-Reviser's Notes, at A 185 (1947) (Hereinafter Rep. No. 308);[2] section 41(20) afforded original jurisdiction in the

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1 The Ninth Circuit Court's articulated position is a recent one; in *Sampson v. United States*, 533 F.2d 499 (9th Cir. 1976), the court, discussing laches but not a statute of limitations, concluded that it had jurisdiction under 25 U.S.C. § 345 to review the administrative denial of an Indian allotment application some 40 years after the denial. *Id.* at 500-501.

2 The Report of the House of Representatives Committee on the Judiciary which accompanied H.R. 3214, 80th Cong., 1st Sess. (1947), the bill which was eventually enacted as the 1948 Judicial Code, analyzed the source and derivation of each section of the proposed Judicial Code, and in "Reviser's Notes" detailed all differences between each proposed Code section and its predecessor or source section. H.R. Rep. No. 308, *supra*, Appendix-Reviser's Notes, A1. The Report states that "[t]he reviser's notes are keyed to sections of the revision and explain in detail *every change* made in text." *Id.*, at pg. 7, (emphasis added).

Federal district courts for enumerated actions, and established a six-year statute of limitations for those actions. *See,* 28 U.S.C. § 41(20) (1940 Ed.). However, § 41(20) had no relevance to actions by Indians concerning their rights in allotments, because the district courts were given jurisdiction over those actions by §§ 345-346 and by an entirely separate provision of the 1940 and earlier Judicial Codes, § 41(24).[3] No statute of limitations was imposed upon such actions by § 41(24), by §§ 345-346, or by any other statute. *See,* 25 U.S.C. §§ 345-346, 28 U.S.C. § 41(24) (1940 Ed.).

This history makes it clear that the applicability of § 2401(a) to actions brought pursuant to 25 U.S.C. §§ 345-346 must arise, if at all, solely because the 1948 recodification of Title 28 was intended to impose upon §§ 345-346 actions a limitation which had not previously existed. However, the recodification which produced the 1948 Judicial Code clearly had no such purpose.

In the 1948 Revision of the Judicial Code, § 41(20) was merely simplified by separating its jurisdictional and limitation provisions: the jurisdictional provisions were codified at 28 U.S.C. § 1346, and the limitation provisions were codified at 28 U.S.C. § 2401(a). The Reviser's Note to § 2401 explains that the section is "[b]ased on title 28, U.S.C., 1940 ed., §§ 41(20), 942 . . .," and further states that the "[s]ection consolidates provision in section 41 (20) of title 28, U.S.C., 1940 ed., as to time limitation for bringing actions against the United States *under section*

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[3] See, F. Cohen, *Handbook of Federal Indian Law,* (1982 Ed.), at 313-316, and particularly at 314, n. 265, for a discussion of the history and inter-relation of these provisions.

1346(a) of this title, with section 942 of said title 28." Rep. No. 308, *supra,* at A185 (Emphasis added). Thus, the Reviser's Note itself is explicit, that the statute of limitations established by § 2401(a) is derived from § 41 (20) of the 1940 Code, and that it applies "for bringing actions against the United States *under section 1346(a)*", thus encompassing those actions which were enumerated in § 41(20). *See,* Reviser's Note to § 1346, *Id.* at A121. Conspicuously lacking is any reference whatsoever to actions against the United States pursuant to § 41(24) of the 1940 Code or § 1353 of H.R. 3214, the codification of that prior Code provision in H.R. 3214 and later in the 1948 Judicial Code as 28 U.S.C. § 1353. *See,* Reviser's Note to § 2401, *Id.,* at A185. Nor is there any reference to actions pursuant to 25 U.S.C. §§ 345-346. Indeed, the entire Reviser's Note to § 2401 speaks only of changes from the provisions of § 41(20); there is no reference whatsoever to any intended change affecting § 41(24). *Id.*

Similarly lacking in the Reviser's Notes to § 1353 is any indication that the codification of § 41(24) was intended to impose a statute of limitations upon actions brought pursuant to that section. Reviser's Notes to § 1353, *Id.* at A124. Clearly, then, the revisers of the 1948 Judicial Code, and Congress in its consideration of that revision, did not contemplate the imposition of a statute of limitations upon actions brought pursuant to § 1353 of H.R. 3214, where no such statute of limitations had existed under § 41(24), the 1940 Code provision from which that section was derived. A fortiori, no statute of limitations on actions pursuant to 25 U.S.C. §§ 345-346 was intended.

In enacting the 1948 Judicial Code, Congress adhered to the well-established rule of statutory construction that unless an intent to effect a change is clearly expressed, no change of law or policy can be presumed from revision and consolidation of statutes. *United States v. Ryder,* 110 U.S. 729, 739-40 (1884); *McDonald v. Hovey,* 110 U.S. 619, 629 (1884); *Anderson v. Pacific Coast S.S. Co.,* 225 U.S. 187, 199 (1912); *See,* Barron, *The Judicial Code,* 8 F.R.D. 439, 445-46 (1949) (Comments of Chief Reviser of the 1948 Judicial Code).

These principles of statutory construction and the comments of the Chief Reviser of the 1948 Judicial Code compel the conclusion that the sweeping change of law and policy which the court below concluded was effected by the enactment of the Judicial Code of 1948, the imposition of a six year statute of limitations upon actions brought pursuant to 25 U.S.C. §§ 345-346, simply did not occur; and that now, as was the case prior to the codification and consolidation of former § 41(20) in the 1948 Judicial Code, no statute of limitations exists for actions brought pursuant to 25 U.S.C. §§ 345-346.

Lending further support to this premise is the equally well-established principle that in order to change or modify the special rights afforded Indians by statutes such as §§ 345-346, there must be some clear expression of Congressional intent to do so, *Hemmer v. United States,* 204 F. 898, 906 (8th Cir. 1912), *aff'd.,* 241 U.S. 379 (1916); *See, Squire v. Capoeman,* 351 U.S. 1, 6-8 (1956); *Morton v. Mancari,* 417 U.S. 535, 550-51 (1974), Congressional intent which is clearly lacking in the legislative history of the 1948 Judicial Code. Equally compelling is the established premise that actions involving Indian trust lands

are not subject to laches and statutes of limitations. *Ewert v. Bluejacket*, 259 U.S. 129, 138 (1922); *See, Oneida County, N.Y. v. Oneida Indian Nation*, 105 S.Ct. 1245, 1255-57 (1985).

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CONCLUSION

At issue in this case is the important question whether a statute of limitations applies to bar actions against the United States by Indian allottees relating to their Indian allotments held in trust by the United States. The Court of Appeals, in concluding that the statute of limitations of 28 U.S.C. § 2401(a) applies, disregarded the derivation and legislative history of § 2401(a), and adopted a position in conflict with that of the Eighth and Tenth Circuit Courts of Appeals.

By granting this petition for certiorari, and reviewing and reversing the judgment of the court below, this Court should resolve this straightforward but important question and restore conformity to the decisions of the circuit courts of appeals.

Respectfully submitted this 3rd day of September, 1985.

RICHARD E. OLSON, JR.

NEVADA INDIAN-RURAL LEGAL SERVICES

600 East William Street, Suite 301
Carson City, Nevada 89701
Telephone: (702) 885-5110

Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-1971
D.C. No. CV R-83-93

ELAINE CHRISTENSEN, ORVILLE BROWN,
DORAN PETE and GLADYS WALKER,
Plaintiffs-Appellants,

UNITED STATES OF AMERICA, et al.,
Defendants-Appellees.

OPINION

(Filed March 12, 1985)

Appeal from the United States District Court
For the District of Nevada

The Honorable Edward C. Reed, Jr., Presiding
Argued and Submitted February 12, 1985

Before: WALLACE, HUG, and SKOPIL, Circuit Judges.
HUG, Circuit Judge:

The appellants filed this action seeking monetary and injunctive relief against the United States based on the Bureau of Indian Affair's failure to provide the appellants access to an Indian land allotment. The district court entered summary judgment for the United States on the ground that the appellants' claims were barred by the applicable statute of limitations. *Christensen v. United States,* 583 F. Supp. 1539 (D. Nev. 1984). We affirm.

FACTS AND PROCEEDINGS BELOW

The appellants are four American Indians who claim an undivided interest in an Indian allotment originally

issued to Katie Martinez by trust patent in 1933. Since that time, the United States has held the property in trust. At the time of issuance, the allotment was surrounded by public and private fee land. Access to the Martinez allotment was attainable only through private land. Katie Martinez and her husband were granted a right-of-way across a parcel of private land, which right-of-way was revoked by the private land owners in 1951.

Since 1951, the appellants have made numerous requests to the Bureau of Indian Affairs to provide access to the allotment. The appellants were represented by counsel since 1972 but no access was obtained. Finally, in 1983, the appellants filed the present action seeking (1) a declaratory judgment that the United States has an obligation to provide access to the allotment; (2) a writ of mandamus requiring the United States to provide access; (3) a declaration that the United States is liable for damages caused by the years of deprivation of use of the property; and (4) an award of damages for the alleged deprivation.

In response to the Government's motion for summary judgment, the district court concluded that the appellants' action under 25 U.S.C. § 345 was time-barred by the six-year statute of limitations provided by 28 U.S.C. § 2401(a). The present appeal followed.

DISCUSSION

A. *Standard of Review*

In reviewing a grant of summary judgment, we decide whether there exists any material disputed fact and whether the substantive law was correctly applied. *Amaro*

v. Continental Can Co., 724 F.2d 747, 749 (9th Cir. 1984). The parties do not contest the fact that the appellants' cause of action accrued long before six years prior to the commencement of this action. Therefore, the sole question is whether the district court applied the appropriate statute of limitations, a question of law. *Aragon v. Federated Department Stores,* slip op. 83-6435 at 30 (9th Cir. Jan. 11, 1985); *Edwards v. Teamsters Local Union No. 36,* 719 F.2d 1036, 1039 (9th Cir. 1983), *cert. denied,* — U.S. —, 104 S. Ct. 1599 (1984). Decisions of law are reviewed *de novo. United States v. McConney,* 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied,* 105 S. Ct. 101 (1984).

B. *Merits*

The appellants' claims are founded in 25 U.S.C. § 345, which gives federal courts jurisdiction to determine whether an allotee has been deprived of rights acquired through an Indian allotment. *Arenas v. United States,* 322 U.S. 419, 432 (1944). The court's power is not restricted to compelling the issuance of a patent, but extends to protect, preserve, or define an allotment once issued. *Scholder v. United States,* 428 F.2d 1123, 1126 (9th Cir.), *cert. denied,* 400 U.S. 942 (1970); *United States v. Pierce,* 235 F.2d 885, 888 (9th Cir. 1956).

Section 345 serves as a limited waiver of the Government's sovereign immunity. *Scholder,* 428 F.2d at 1126. We have held that 28 U.S.C. § 2401(a), which provides a six-year statute of limitations to "every civil action commenced against the United States," applies to actions brought under section 345. *Loring v. United States,* 610 F.2d 649, 650 (9th Cir. 1979).

The appellants claim that the application of section 2401(a) should be limited to impose time limitations only to the extent of its predecessor, 28 U.S.C. § 41(20), which provided a limitations period for Tucker Act claims. The Tucker Act was concerned only with claims for monetary relief, and the appellants argue that the subsequent enactment of section 2401(a) did not evince any congressional intent to extend its scope to equitable claims.

In *Werner v. United States*, 188 F.2d 266 (9th Cir. 1951), we addressed the issue raised by the appellants. In that case, the plaintiff brought a suit against the United States for reformation of a lease and damages. The cause of action accrued more than six years before the action had been filed. We observed that Title 28—within which section 2401(a) is enumerated—was not a mere codification of prior law, but also a revision. *Id.* at 268. We held that section 2401(a) unambiguously provides a general statute of limitations and that therefore "[t]he provisions of Section 2401(a) apply to a suit for reformation, originally an action in equity, precisely as they would to a suit for damages, an action at law." *Id. Accord, Walters v. Secretary of Defense*, 725 F.2d 107, 113 (D.C. Cir. 1983). The appellants' contention that section 2401(a) does not apply to actions in equity is without merit.

Reading *Loring* and *Werner* together, we cannot escape the conclusion that section 2401(a) applies to *all* actions brought under section 345, whether the relief requested is legal or equitable. The appellants argue, however, that because of the special trust relationship between the United States and American natives, laches and statutes of limitations are not generally invoked against Indians. There are cases in which courts have failed to

apply a statute of limitations to actions which would appear to have been untimely under section 2401(a). *See Sampson v. United States,* 533 F.2d 499 (9th Cir. 1976) (although section 345 action brought for a denial of a 1926 allotment application, court does not apply statute of limitations). However, speculation as to any *sub silentio* ruling in *Sampson* on the inapplicability of section 2401(a) to section 345 actions is rendered unnecessary by the explicit holdings in *Loring* and *Werner,* to which we are bound. *See Walters,* 725 F.2d at 112 n.12 (in determining whether section 2401(a) is applicable, "the observation that courts have not, in particular cases, addressed the issue of a possible time bar does not lead to the conclusion that no such problem existed, and certainly does not control the case at bar.").

We conclude that the appellants' equitable and legal claims under section 345 are time-barred by the six-year statute of limitations provided by section 2401(a). Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-R-83-93-ECR

ELAINE CHRISTENSEN, ORVILLE BROWN, DORAN PETE and GLADYS WALKER,
Plaintiffs,

UNITED STATES OF AMERICA and WILLIAM RUCKELSHAUS, United States Secretary of Interior,
Defendants.

MEMORANDUM DECISION
AND ORDER

(Filed April 27, 1984)

Defendant Ruckelshaus is hereby substituted, pursuant to Fed.R.Civ.P. 25(d), for James Watt, his predecessor in the office of Secretary of Interior.

The defendants have moved for summary judgment on the grounds that the action is barred by the applicable statute of limitations and that the complaint fails to state a claim upon which relief can be granted against them.

In 1933, the United States granted a trust allotment to Katie Martinez, a Washoe Indian. The granting document made no mention of rights-of-way or other access to the allotment. The most feasible access from the nearest public road requires the crossing of land that has been privately owned since 1867. The owners permitted Katie Martinez and her husband to cross their land until their deaths, which occurred in 1948 and 1951, respectively. Then the path they had been using was fenced off.

The plaintiffs herein, who are heirs of Katie Martinez, have made ongoing requests to the Bureau of Indian Affairs to provide access to the allotment. Since 1972 those requests have been made by attorneys for the plaintiffs. No access has been provided.

The complaint alleges that the United States has breached the duty imposed on it by 25 U.S.C. § 348 to hold the allotment in trust for the sole use and benefit of the Indian allottee. That duty encompasses the obligation to furnish unrestricted access, according to the plaintiffs. The prayer for relief asks for a declaratory judgment that the United States is obligated to provide unrestricted access, and for a writ in the nature of mandamus requiring the Secretary of Interior to take immediate action to implement the same.

The defendants argue that § 348 does not impose a trust obligation to provide access to the allottment, therefore a claim for relief has not been stated. Also, they point out that 28 U.S.C. § 2401(a) states that ". . . every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." The complaint herein was not filed until 1983. The right of access was revoked in 1951.

The plaintiffs emphasize that Congress' intent in enacting the General Allotment Act was to make the Indian allottees secure in their possession so that they would actually use and benefit from the allotments. This cannot be accomplished without access. Therefore, it is urged, equitable relief should be granted even if damages are precluded. As to the statute of limitations defense, the

plaintiffs insist that 28 U.S.C. § 2401(a) is not applicable to an action brought under 25 U.S.C. § 345. The latter statute authorizes any Indian who has been excluded from his allotment to bring an action in a proper United States District Court. The legislative history of § 2401(a) is cited for the proposition that Indian claims are meant to be treated differently than other civil claims against the United States. Prior to 1948 legislation they were treated uniquely; the plaintiffs contend that the legislation does not reflect an intent to change this preferential treatment of the Government's Indian wards. No general statute of limitation is meant to bar an Indian's suit against the United States for breach of trust, they assert.

Contrary to the plaintiffs' position, it has been held that 28 U.S.C. § 2401(a) is more than a mere codification of prior law—it is also a revision. *Werner v. United States,* 188 F.2d 266, 268 (9th Cir. 1951). Furthermore, it is jurisdictional. *Loring v. United States,* 610 F.2d 649, 650 (9th Cir. 1979). *Loring* was an action brought under 25 U.S.C. § 345, as is the instant litigation. § 2401(a) applies to equitable claims against the Government as much as to damages claims. *Nichols v. Hughes,* 721 F.2d 657, 659 (9th Cir. 1983); *Werner v. United States, supra* at 268.

There have been cases that have held that where a fiduciary relationship exists between the parties, a statute of limitations doesn't begin to run until the relationship is repudiated. *See Manchester Band of Pomo Indians, Inc. v. United States,* 363 F.Supp. 1238, 1249 (N.D. Cal. 1973). Those cases have been distinguished, however, on the ground that they all involved liquidated claims whose validity was uncontested and for which money had been

appropriated. *Capoeman v. United States,* 440 F.2d 1002, 1003 (Ct.Cl. 1971). In any event, the defendants herein repudiated any fiduciary obligation as to providing access to the allotment more than six years prior to the commencement of this action.

Where the Government has consented to be sued, any limitation period established by Congress must be strictly observed; exceptions are not to be implied. *Mann v. United States,* 399 F.2d 672, 673 (9th Cir. 1968). Accordingly, the fact that a plaintiff is an Indian who may be more dependent on the Government than most people does not create an exception to the applicable statute of limitations. *Ibid.; Capoeman v. United States, supra* at 1007-8; *Hydaburg Co-op Ass'n v. United States,* 667 F.2d 64, 69-70 (Ct. Cl. 1981).

In federal court, a cause of action accrues when an injury is discovered. *Nichols v. Hughes, supra* at 659. The fencing off of the access path and the revocation of permission to use it occurred in 1951 or very shortly thereafter. The plaintiffs admittedly were aware of the changes and their effect on the allotment. Their action against the defendants is time-barred by 28 U.S.C. § 2401(a). That being the case, the issue of whether the defendants have breached a duty to the plaintiffs need not be decided here.

The Court can sympathize with the plaintiffs' feelings that they have been wronged. There may well be a moral obligation on the part of the Government to attempt to rectify the situation. Nevertheless, such an obligation, if it exists, cannot be enforced in this lawsuit.

A statute of limitations defense is properly asserted by a motion for summary judgment. *Admiralty Fund v.*

Jones, 677 F.2d 1289, 1293 (9th Cir. 1982). If the action is clearly barred, the defendants are entitled to judgment as a matter of law. *Ibid.* Such is the case here, where no factual issues need be adjudicated to determine whether the statute has run.

IT IS, THEREFORE, HEREBY ORDERED that the plaintiffs complaint be DISMISSED.

DATED: April 23, 1984.

/s/ Edward C. Reed,
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-1971
D.C. No. CV R-83-93

ELAINE CHRISTENSEN, ORVILLE BROWN, DORAN PETE and GLADYS WALKER,

Plaintiffs-Appellants,

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

ORDER

(Filed June 7, 1985)

Appeal from the United States District Court
for the District of Nevada

Before: WALLACE, HUG, and SKOPIL, Circuit Judges.

The panel, as constituted in the above case, has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

25 U.S.C. §§ 345-346

§ 345. Actions for allotments.

All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands now held by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: *Provided*, That the right of appeal shall be allowed to either party as in other cases.

§ 346. Proceedings in actions for allotments

The plaintiff shall cause a copy of his petition filed under section 345 of this title, to be served upon the United States attorney in the district wherein suit is brought, and shall mail a copy of same, by registered letter, to the Attorney General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the United States attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the Government, and to file a notice of any counterclaim, set-off, claim for damages, or other demand or defense whatsoever of the Government in the premises: *Provided,* That should the United States attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court.

28 U.S.C. § 41 (20) (1940 Ed.)

(20) Suits against United States.

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or

upon any regulation of an exectuive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all setoffs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. Nothing in this paragraph shall be construed as giving to either the district courts or the Court of Claims jurisdiction to hear and determine claims growing out of the Civil War, and commonly known as "war claims", or to hear and determine other claims which had been rejected or reported on adversely prior to the 3d day of March 1887 by any court, department, or commission authorized to hear and determine the same, or to hear and determine claims for pensions; or as giving to the district courts jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such pur-

pose by persons claiming as such officers, or as assignees or legal representatives thereof; but no suit pending on the 27th day of June 1898 shall abate or be affected by this provision. No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. The claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury.

28 U.S.C. § 41 (24) (1940 Ed.)

(24) Suits concerning allotments of land to Indians; decrees; appeal.

Twenty-fourth. Of all actions, suits, or proceedings involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty.

And the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him; but this provision shall not apply to any lands held on or before December 21, 1911, by either of the Five Civilized Tribes, the Osage Nation of Indians, nor to any of the lands within the Quapaw Indian Agency. The right of appeal shall be allowed to either party as in other cases.